On August 27, 2002, the District Attorney moved the Superior Court to declare the Probate Court conviction "null and void." The State's motion was based upon O.C.G.A. § 40-6-376(d), which provides:

> No court, other than a court having jurisdiction to try a person charged with a violation of Code Section 40-6-393 [vehicular homicide], shall have jurisdiction over any offense arising under the laws of this state or the ordinances of any political subdivision thereof, which offense arose out of the same conduct which led to said person's being charged with a violation of Code Section 40-6-393 and any judgment rendered by such court shall be null and void.

In response, Petitioner challenged the applicability as well as the constitutionality of O.C.G.A. § 40-6-376(d). He argued, based on the statute's own wording, that it applied only to municipal courts, not to probate courts.[4] He further argued in a motion that if interpreted as applicable, the statute was unconstitutional both "on its face" and "as applied" under the federal and state double jeopardy clauses. Petitioner pointed out in the motion that the Probate Court had already convicted and punished him for the same offense.

On September 20, 2001, Judge Coy Temples agreed that O.C.G.A. § 40-6-376(d) did not apply, and he sustained Petitioner's plea of former jeopardy. Upon finding the statute inapplicable, Judge Temples declined to address its constitutionality. [A-6]

The State appealed. On July 15, 2002, the Georgia Court of Appeals, in a split decision, affirmed and held that the

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[4] Under Georgia law, probate courts have jurisdiction over misdemeanor vehicular homicide cases, while municipal courts do not. O.C.G.A. § 40-13-21. [A-31] Thus the terms of O.C.G.A. § 40-6-376(d) appeared to exclude probate courts because a probate court is "a court having jurisdiction to try a person charged with a violation of Code Section 40-6-393 [vehicular homicide]."

statute did not apply. *State v. Perkins*, 256 Ga. App. 855, 569 S.E.2d 910 (2002). [A-10]

On *certiorari*, the Georgia Supreme Court reversed. In an opinion rendered on May 5, 2003, the Court construed O.C.G.A. § 40-6-376(d) broadly, finding that it applied to probate courts as well as to municipal courts. The Court spoke approvingly of "the jurisdictional exception" to double jeopardy, but remanded for a determination of the statute's constitutionality. *State v. Perkins*, 276 Ga. 621, 580 S.E.2d 523 (2003). [A-18]

On remand in the Superior Court, Petitioner again challenged the constitutionality of the statute "on its face" and "as applied" under the Double Jeopardy Clause. On March 25, 2004, Judge Cindy Morris summarily denied Petitioner's challenges to the statute's constitutionality, ruling that "O.C.G.A. § 40-6-376(d) is constitutional." [A-25]

Petitioner timely appealed to the Georgia Supreme Court, once again challenging the statute's constitutionality "on its face" and "as applied" under the Double Jeopardy Clause. On June 6, 2005, however, the Georgia Supreme Court affirmed the trial court, rejecting Petitioner's constitutional challenges. The Court held that, as a result of O.C.G.A. § 40-6-376(d), the Probate Court lacked "subject matter jurisdiction" and that the State could retry Petitioner in the Superior Court. *Perkins v. State*, 279 Ga. 506, 614 S.E.2d 92 (2005). [A-26]

The Court then added, "Any issues of substantive double jeopardy that may arise if Perkins is convicted in superior court are not properly before us today." [A-27] In a timely filed motion for rehearing, Petitioner suggested that this comment was inconsistent with *Abney v. United States*, 431 U.S. 651, 660-61 (1977), in which this Court held that the Double Jeopardy Clause protects not only against second convictions and second punishments, but also "against being twice put to *trial* for the same offense." (Emphasis in original.) The Court summarily denied the motion on June 30, 2005. [A-28]

REASONS TO GRANT THE WRIT

Introduction

This case presents the Court with an opportunity to resolve the question of whether there is a "jurisdictional exception" to double jeopardy.

This Court has never, in its entire history, mentioned a "jurisdictional exception" to double jeopardy by name. Nor has this Court ever used "lack of jurisdiction" as a sole basis to disallow a double jeopardy claim. Most courts in modern times have rejected the doctrine, limited it, or found it inapplicable. The Georgia Supreme Court, however, has approved a state statute which fully embodies and exploits the doctrine.

If this Court grants *certiorari* in this case, it may decide the issue left unresolved by this Court's "equally divided" opinion in *Fugate v. New Mexico*, 470 U.S. 904, (1985)– the "jurisdictional exception" spawned by *Diaz v. United States*, 223 U.S. 442 (1912). As most courts have held, the "*Diaz* exception" is no longer tenable because it permits a second prosecution which would otherwise be barred by the "same elements test" this Court established in *Blockburger v. United States*, 284 U.S. 299 (1932).

Like the judicially created "*Diaz* exception," O.C.G.A. § 40-6-376(d) enables a second prosecution that would otherwise be barred by *Blockburger*. The statute's intent, evidenced by its wording, its construction, and its application in this case, is to "block" *Blockburger* and to circumvent the fundamental double jeopardy protections this Court defined in *North Carolina v. Pearce*, 395 U.S. 711 (1969). It does so through a legal fiction– that a previous prosecution, conviction and fully served sentence "legally didn't happen."

This case is free of extraneous issues. It presents the ideal set of law and facts upon which this Court may decide the validity or invalidity of the "jurisdictional exception" to double jeopardy.

Question 1. Is Georgia's statutory "jurisdictional exception" to double jeopardy, O.C.G.A. § 40-6-376(d), unconstitutional under the Double Jeopardy Clause as applied to the facts of this case, where, following an apparently valid conviction and a fully served sentence, the statute enables a second prosecution that would otherwise be barred under the "same elements test" of *Blockburger v. United States*, 284 U.S. 299 (1932)?

This Court has repeatedly held that the Double Jeopardy Clause protects against second convictions and against second punishments. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).[5] The Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

O.C.G.A. § 40-6-376(d) would enable the State to seek a second conviction and a second punishment; therefore it is unconstitutional "as applied." Questions of "jurisdiction" aside, this statute is specifically unconstitutional as applied to someone who has been convicted and who has fully served his sentence.

Petitioner was convicted. The Georgia Supreme Court itself characterized Petitioner's sentence as a "prior conviction." *Perkins v. State*, 279 Ga. 506, 506, 614 S.E.2d 92,

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[5] "The Fifth Amendment guarantee against double jeopardy . . . has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Pearce*, 395 U.S. at 717. *Accord*, *United States v. Wilson*, 420 U.S. 332, 342-43 (1975); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Simpson v. United States*, 435 U.S. 6, 11 n.5 (1978); *Whalen v. United States*, 445 U.S. 684, 688 (1980); *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Albernaz v. United States*, 450 U.S. 333, 343 (1981); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-07 (1984). The first protection, against a second prosecution following an acquittal, is the only interest not implicated here.

92 (2005).[6] [A-26] Moreover, the Probate Court's judgment was a sentence for reckless driving, and Georgia probate courts generally have jurisdiction over cases of reckless driving.[7] There was nothing on the face of the judgment suggesting invalidity. Further, because the Superior Court indictment was not returned until months later, there was nothing on file in *any* court, or in *any* public record, that would suggest the Probate Court's "lack of jurisdiction."

Petitioner was punished. The Probate Court sentenced Petitioner to three months on probation. The State enforced the sentence, and Petitioner fully served the sentence, meeting its restrictive conditions and paying the fine and the probation fees. The fine and fee payments were punishment.[8] Moreover, by definition, probation is punishment, and a loss of liberty. *Alabama v. Shelton*, 535 U.S. 654 (2002). The six-month suspension of Petitioner's driver's license also amounted to a loss of liberty. *Hardison v. Martin*, 254 Ga. 719, 721, 334 S.E.2d 161, 164 (1985).[9]

Thus O.C.G.A. § 40-6-376(d) in this case would violate two of the fundamental principles of the Double Jeopardy Clause– its protection against second convictions and its protection against second punishments. Yet the Georgia Supreme Court refused to apply, or even to acknowledge, these

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[6] *See also*, *State v. Williams*, 214 Ga. App. 701, 702, 448 S.E.2d 700, 701 (1994) (guilty plea and sentence on improper passing constituted a conviction which barred a subsequent prosecution for misdemeanor vehicular homicide).

[7] O.C.G.A. § 40-6-390; O.C.G.A. § 15-9-30(b)(8); O.C.G.A. § 40-13-21. [A-30, A-31]

[8] *See Ex Parte Lange*, 85 U.S. 163, 175-76 (1874), which held that the payment of a fine precluded a second punishment.

[9] If Petitioner were convicted of vehicular homicide, he would lose his driver's license again. O.C.G.A. §§ 40-5-54, 40-5-63. [A-32]

fundamental principles, and instead chose "the jurisdictional exception."

The history of this dubious doctrine– from an unanswered hypothetical in *Ex Parte Lange*, 85 U.S. 163 (1874), to an alternative basis for a disallowed double jeopardy claim in *Diaz v. United States*, 223 U.S. 442 (1912), to the rejection of the doctrine by most courts following *Waller v. Florida*, 397 U.S. 387 (1970), to this court's "equally divided" opinion in *Fugate v. New Mexico*, 470 U.S. 904 (1985), and finally to differing views of the doctrine in *State v. Corrado*, 81 Wash. App. 640, 915 P.2d 1121 (1996); *People v. Manila*, 2005 Guam 6 (2005); and *State v. Rodriguez*, ____ N.M. ____, 116 P.3d 92 (2005)– is set forth below.

Question 2. Has the judicially created "jurisdictional exception" to double jeopardy, engendered by *Diaz v. United States*, 223 U.S. 442 (1912), been overruled by *Blockburger v. United States*, 284 U.S. 299 (1932); *Waller v. Florida*, 397 U.S. 387 (1970); *Brown v. Ohio*, 432 U.S. 161 (1977); and *Illinois v. Vitale*, 447 U.S. 410 (1980)?

A. The "jurisdictional exception"– a house built upon sand.

Although the "jurisdictional exception" appears to have been spawned by *Diaz v. United States*, 223 U.S. 442 (1912), dicta in three older cases– *Ex Parte Lange*, 85 U.S. 163 (1874), *United States v. Ball*, 163 U.S. 662 (1896), and *Grafton v. United States*, 206 U.S. 333 (1907)– provide argument but not support for the notion.

In *Lange*, the petitioner was sentenced to a fine of $200.00 and one year in prison upon his conviction for misappropriating mailbags. The relevant statute's prescribed punishment, however, was a fine of up to $200.00 *or* imprisonment of up to one year, but not both. Mr. Lange paid the fine to the clerk, who paid it into the United States Treasury. Subsequently, on writ of habeas corpus, the trial

court realized its error, vacated the former judgment and imposed a one-year prison sentence. This Court, however, held that because Mr. Lange had paid the fine, the principles of double jeopardy precluded a second punishment, and ordered that the prisoner be discharged. In this Court's majority opinion, Justice Miller posed the following hypothetical question:

> Nor are we prepared to say, if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held– so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force– whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no such case before us.

Lange, 85 U.S. at 174.

In *Ball*, this Court broke from the English rule and held that an acquittal, even on a "fatally defective" indictment, bars retrial.[10] Nevertheless, in noting that the court which tried Mr. Ball on the "fatally defective" indictment had jurisdiction, this Court remarked, "[a]n acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence." *Ball*, 163 U.S. at 669. This of course was dicta, since *Ball*, like *Lange*, held for the double jeopardy claimant.

In *Grafton*, a soldier stationed in the Philippines (then a United States territory) was charged with murder. He was acquitted in a military court-martial but was later prosecuted for the same offense in a civilian court. He filed a plea of

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[10] *Ball*, 163 U.S. at 664-671. *See also*, *Benton v. Maryland*, 395 U.S. 784 (1969) (acquittal on a "void" indictment bars retrial).

former jeopardy, which was denied, and he was convicted. This Court reversed the conviction, holding that the principles of double jeopardy should have barred the second trial for the same offense in the civilian court. This Court rejected the government's "suggestion that Grafton had committed two distinct offenses– one against military law and discipline, and the other against the civil law," 206 U.S. at 351, because both the court-martial and the civilian court derived their power from the government of the United States. *Grafton*, 206 U.S. at 355. In noting that the court-martial had jurisdiction to try Grafton for the offense, this Court stated:

> We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court.

Grafton, 206 U.S. at 345. As in *Lange* and *Ball*, this statement in *Grafton* was dicta. Jurisdiction was not an issue in any of these three cases, and this Court sustained the double jeopardy claim in each.

In *Diaz v. United States*, 223 U.S. 442 (1912), this Court for the first time mentioned "lack of jurisdiction" in *denying* a double jeopardy claim. "Lack of jurisdiction," however, was merely an alternative basis for this Court's holding, and that alternative basis has not withstood the test of time.

Diaz held that a prior assault and battery conviction before a Philippine justice of the peace did not bar a homicide prosecution because the victim did not die until after the conviction. 223 U.S. at 449. This scenario and holding would later become known as the "necessary facts exception,"

indicating that when the first conviction was obtained, the prosecution lacked the "necessary facts" to proceed upon the greater offense; thus there was no jeopardy as to that offense at that time.[11]

Nevertheless, as an alternative basis for its holding, this Court noted that the justice of the peace lacked jurisdiction to try homicide cases and that "jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction." Importantly, this part of *Diaz* was premised upon the Court's finding that the two charges were "distinct offenses both in law and in fact." *Diaz*, 223 U.S. at 448-49.

But, twenty years later, in *Blockburger v. United States*, 284 U.S. 299 (1932), this Court held that, for double jeopardy purposes, a lesser included offense and a greater offense arising from the same facts are not "distinct offenses," they are the same.[12] Blockburger was found guilty of three narcotics sales to the same purchaser. He contended that two of the sales, having been made only a day apart, were a single continuing offense. This Court rejected that contention because each of the two offenses required "proof of a different element." This Court then set forth the "same elements test":

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

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[11] *See, e.g., Culberson v. Wainwright*, 453 F.2d 1219, 1220-21 (5th Cir. 1972) (allowing a manslaughter prosecution where the victim died after the defendant's conviction for simple assault); *Mitchell v. Cody*, 783 F.2d 669, 671 (6th Cir. 1986) (allowing a vehicular homicide prosecution where the victim died after the defendant's conviction for DWI). *See also, Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977) ("An exception may exist" where the "facts necessary" to sustain the greater charge "have not occurred").

[12] *Accord, Brown v. Ohio*, 432 U.S. 161, 166 (1977); *Harris v. Oklahoma*, 433 U.S. 682, 682 (1977); *Illinois v. Vitale*, 447 U.S. 410, 421 (1980); *United States v. Dixon*, 509 U.S. 688, 696 (1993).

> offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304. Thus, under *Blockburger*, if each offense requires proof of a different fact– or element– that the other does not, the two offenses are not the same. Conversely, if either offense does not require proof of an element that the other does not– as where one of the offenses is "included" in the other– then, for double jeopardy purposes, the two offenses are the same.

Nevertheless, both before and after *Blockburger*, a number of courts adopted the stray concept which had been the alternative basis of *Diaz* and applied a "jurisdictional exception" to double jeopardy protections. These courts held that a previous conviction for a lesser offense did not bar prosecution of a greater offense arising out of the same facts, where the lower court lacked jurisdiction over the greater offense.[13] Other courts, some even before *Lange*, allowed a second prosecution of a single offense despite a prior conviction for that offense where the convicting court "lacked

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[13] C.E. Basham, Annotation, *Conviction or Acquittal of One Offense, in Court having No Jurisdiction to Try Offense Arising Out of Same Set of Facts, Later Charged in Another Court, as Putting Accused in Jeopardy of Latter Offense*, 4 A.L.R.3rd 874,§ 4[a] (2003). *See, e.g.*, *Crowley v. State*, 94 Ohio St. 88, 92, 113 N.E. 658, 659 (1916) (assault and battery / assault with intent to rape); *People v. Townsend*, 214 Mich. 267, 275, 183 N.W. 177, 180 (1921) (DWI / felony manslaughter); *Bowman v. State*, 160 Tenn. 305, 308-09, 23 S.W.2d 658, 659-60 (1930) (public drunkenness / DUI); *Bacom v. Sullivan*, 200 F.2d 70, 72 (5th Cir. 1952) (DUI / manslaughter); *Chester v. State*, 216 Miss. 748, 750, 63 So. 2d 99, 100 (1953) (simple assault / felony assault and battery); *State v. Holm*, 55 Nev. 468, 470-72, 37 P.2d 821, 821-22 (1955) (assault & battery / attempted rape); *State v. Barnette*, 158 Me. 117, 118-25, 179 A.2d 800, 800-04 (1962) (aiding delinquency of a child / statutory rape). *See also*, *Grear v. Maxwell*, 355 F.2d 991, 991-93 (6th Cir. 1966) (aborted juvenile court proceeding, where juvenile court had jurisdiction over aiding delinquency charge but not over attempted rape charges, did not bar prosecution of the felony charges).

jurisdiction" for various reasons, usually procedural deficiencies.[14]

B. The strange career of the "jurisdictional exception" since *Waller v. Florida*– rejection, limitation and resurrection.

Waller v. Florida, 397 U.S. 387 (1970) seemed to sound a death knell for the "jurisdictional exception." In *Waller*, the defendant had been convicted of destruction of city property and breach of the peace in a municipal court. He was later prosecuted and convicted in a state court for grand larceny arising out of the same facts. This Court rejected the state's contention that the city and the state were dual sovereignties, holding that the state court prosecution for grand larceny should have been barred (assuming that the former offenses were included in the latter under Florida law). *Waller*, 397 U.S. at 394-395. Although this Court did not explicitly discuss the jurisdiction of the respective Florida courts, it was apparent that "[t]he municipal court which heard the lesser offenses in *Waller* did not have jurisdiction to hear the greater charge." *Salaz v. Tansy*, 730 F. Supp. 369, 372 (D.N.M. 1989). Thus, in *Waller* this Court had an opportunity to apply the "jurisdictional exception" but conspicuously declined to do so.

In the wake of *Waller*, most courts which considered the "jurisdictional exception" rejected it, holding that *Waller* had overruled it by implication. The courts then concluded that a

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[14] F.M. English, Annotation, *Plea of Guilty as Basis of Claim of Double Jeopardy in Attempted Subsequent Prosecution for Same Offense*, 75 A.L.R.2d 683, § 5 (2005). *See, e.g., State v. Atkinson*, 28 Tenn. (9 Hum.) 677, 677-79 (1849) (conviction for gaming before a justice of the peace did not bar subsequent prosecution for the same offense, where the offender had not been brought before the justice by process); *State v. Bruce*, 68 Vt. 183, 184-86, 34 A. 701, 702 (1896) (conviction for disturbing the peace before a justice of the peace did not bar subsequent prosecution for the same offense– a three-month delay in entry of guilty plea before the justice "worked a discontinuance of the cause").

previous conviction for a lesser offense in a court of limited jurisdiction barred prosecution of a greater offense arising out of the same facts.[15]

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[15] *See Benard v. State*, 481 S.W.2d 427, 428-29 (Tex. Crim. App. 1972) (driving without driver's license / driving while license suspended); *Robinson v. Neil*, 366 F. Supp. 924, 928-29 (E.D. Tenn. 1973) (assault and battery /assault with intent to murder); *State v. Trivisonno*, 112 R.I. 1, 3-5, 307 A.2d 539, 540-41 (1973) (simple assault / manslaughter); *State ex. Rel Seal v. Shepard*, 299 So. 2d 644, 644-45 (Fla. App. 1974) (failure to remain at scene of accident / willfully leaving scene of accident); *Rouzie v. Commonwealth*, 215 Va. 174, 175-78, 207 S.E.2d 854, 855-57 (1974) (simple assault / malicious wounding); *State v. Anonymous*, 31 Conn. 292, 295, 329 A.2d 136, 138 (1976) (misdemeanor sexual contact / rape); *Perkins v. State*, 143 Ga. App. 124, 124-26, 237 S.E.2d 658, 659-60 (1977) (marijuana possession / marijuana sale); *People v. Gray*, 69 Ill. 2d 44, 51-53, 370 N.E.2d 797 (1977) (wilful contempt in divorce case by shooting wife / aggravated battery and attempted murder), *overruled on other grounds* (contempt not lesser included), *People v. Totten*, 118 Ill. 2d 124, 139, 514 N.W.2d 959, 965 (1987); *Yother v. State*, 182 Mont. 351, 356-57, 597 P.2d 79, 82-83 (1979) (disturbing the peace / first degree assault and resisting officers); *State v. Laguna*, 124 Ariz. 179, 180-81 602 P.2d 847, 848-49 (Ct. App. 1979) (discharging firearm and simple assault / felony charges based on same); *Matter of Castillo*, 293 N.W.2d 839, 841-42 (Minn. 1980) (driving motorcycle without registration / unauthorized use of *stolen* motorcycle); *State v. Foy*, 401 So. 2d 948, 949-50 (La. 1981) (misdemeanor burglary / felony burglary); *State v. Dively*, 92 N.J. 573, 586-87, 458 A.2d 502, 509 (1983) (drunk driving / death by automobile); *State v. Carter*, 291 S.C. 385, 388, 353 S.E.2d 875, 876 (1987) (DUI / reckless homicide), *overruled on other grounds* (DUI not lesser included), *State v. Easler*, 327 S.C. 121, 132-33, 489 S.E.2d 617, 623-24 (1997); *Salaz v. Tansy*, 730 F. Supp. 369, 371-72 (D.N.M. 1989) (obstructing a police officer / battery on an officer.). *See also*, *Culberson v. Wainwright*, 453 F.2d 1219, 1220 (5th Cir. 1972) (simple assault / manslaughter– "jurisdictional exception" rejected but "necessary facts exception" applied); *People v. Kretchmer*, 66 Mich. Ct. App. 548, 550 n.1, 239 N.W.2d 658, 659 n.1 (1976) (acquittal of public intoxication barred prosecution for resisting arrest), *rev'd on other grounds* (the two charges not same offense), 404 Mich. 59, 64-65, 272 N.W.2d 558, 559-60 (1978); *May v. State*, 726 S.W.2d 573, 577 n.7 (Tex. Crim. App. 1987) (involuntary manslaughter conviction barred prosecution for DWI).

Generally these cases simply rejected the doctrine in light of *Waller*, but it was *State v. Corrado*, 81 Wash. App. 640, 915 P.2d 1121 (1996), that took the "jurisdictional exception" to task. In an eminently well-reasoned and well-documented opinion, the Washington Court of Appeals recognized that risk, not jurisdiction, is the test of jeopardy, and that "lack of jurisdiction" does not necessarily mean lack of jeopardy. *Corrado* thus held that "the jurisdictional exception does not apply every time a court intones 'lack of jurisdiction,'" and is inapplicable where the accused is "at risk of conviction and punishment." *Id.*, at 655, 657, 659, 915 P.2d at 1129, 1130, 1132. The court employed a "lack-of-risk test," *id.*, at 655, 915 P.2d at 1130, with two "key factors": (1) "whether the trial court's lack of jurisdiction will appear on the face of the judgme..t or otherwise be apparent to those asked to enforce the judgment," and (2) "whether the state raised the trial court's 'lack of jurisdiction' and objected to the entry of judgment." *Id.*, at 655, 915 P.2d at 1131. Applying this test, the Court held that jeopardy attached upon an acquittal for first degree murder despite the trial court's "lack of jurisdiction" due to the State's failure to file an indictment.[16] *Corrado*'s "lack-of-risk test" reflects this Court's definition of jeopardy in *Breed v. Jones*, 421 U.S. 519, 528 (1975): "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution."

In the years following *Waller*, this Court issued several opinions which reinforced *Blockburger* and cast an even darker

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[16] This was the second appearance of the case before the Washington Court of Appeals. At his original trial, Mr. Corrado was acquitted of first degree murder but convicted of second degree murder. In the first appeal, *State v. Corrado*, 78 Wash. App. 612, 898 P.2d 860 (1995), the conviction was reversed because of the State's failure to file a charge. 81 Wash. App. at 644, 915 P.2d at 1123. In the second appeal, discussed above, the court, citing, *inter alia*, *United States v. Tateo*, 377 U.S. 463 (1964), held that, although Mr. Corrado could not be retried for first degree murder, he could be retried for second degree murder because his jeopardy as to that charge was "'continuing' rather than 'former'" due to his successful appeal. 81 Wash. App. at 647, 649, 915 P.2d at 1125, 1126.

shadow upon the "jurisdictional exception." *Brown v. Ohio*, 432 U.S. 161, 166 (1977), held that "a lesser included and a greater offense are the same under *Blockburger* . . . ," and barred a prosecution for auto theft following a conviction for joyriding. *Harris v. Oklahoma*, 433 U.S. 682, 682 (1977), barred a prosecution for armed robbery where it was the underlying felony in a prior felony murder conviction. In *Illinois v. Vitale*, 447 U.S. 410, 421 (1980), this Court held that:

> under *In re Nielsen*, 131 U.S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense– an offense consisting solely of one or more elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

Vitale concluded that a conviction for failure to reduce speed barred a subsequent prosecution for involuntary manslaughter (assuming that the former was included in the latter under Illinois law). 447 U.S. at 419-20. *Burroughs v. Georgia*, 448 U.S. 903 (1980), vacated (and remanded, in light of *Vitale*) a Georgia Supreme Court judgment holding that a disorderly conduct conviction did not bar a subsequent prosecution for simple battery. In *United States v. Dixon*, 509 U.S. 688 (1993) (holding that dispositions in criminal contempt actions barred subsequent prosecution on some charges and not on others, *id.*, at 699-702), this Court reaffirmed *Blockburger*, *id.*, at 696, citing its "deep historical roots," *id.*, at 704. Thus, unlike the *Diaz* "jurisdictional exception," the *Blockburger* "same elements test" has stood the test of time. Many of the state courts rejecting the "jurisdictional exception" cited *Brown* and *Vitale* as well as *Waller*.

Not all courts, however, rejected the doctrine following *Waller*. In *State v. Nelson*, 51 Ohio App. 2d 31, 36, 365 N.W.2d 1268, 1271 (1977), the Ohio Court of Appeals held that a prior municipal court conviction for petty theft did not

bar a prosecution for robbery, where the municipal court "did not have jurisdiction" because no complaint charging the petty theft had been filed. In *Commonwealth v. Lovett*, 374 Mass. 394, 398-99, 372 N.E.2d 782, 785-86 (1978), the Supreme Judicial Court of Massachusetts held that a prior district court conviction for nighttime burglary did not bar a superior court prosecution for the same offense, where the district court "had no jurisdiction" over that offense. The Court rejected Mr. Lovett's contention that the (rather ambiguous) complaint charged him with a lesser version of the same offense over which the district court did have jurisdiction.

Until the Georgia Supreme Court issued its opinion in the instant case, the staunchest adherent of the "jurisdictional exception" was the Supreme Court of New Mexico. That court adopted the doctrine in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262 (1950) (assault and battery conviction before justice of the peace did not bar subsequent prosecution for rape). Notwithstanding *Waller*, the court reaffirmed (in dicta) its adherence to the "jurisdictional exception" in *State v. James*, 93 N.M. 605, 603 P.2d 715 (1979) (holding that a municipal court dismissal of a DWI did not bar a vehicular homicide prosecution); and again in *State v. Manzanares*, 100 N.M. 621, 674 P.2d 511 (1983) (holding that a municipal court DWI conviction did not bar a vehicular homicide prosecution); and again in *State v. Fugate*, 101 N.M. 58, 678 P.2d 686 (1984) (municipal court DWI conviction did not bar subsequent prosecution for vehicular homicide), *aff'd by an equally divided court*, *Fugate v. New Mexico*, 470 U.S. 904 (1985).

However, the "jurisdictional exception" has had an uneasy tenure, even in New Mexico. In each of the above cases, New Mexico's Supreme Court reversed the state's Court of Appeals. In *Manzanares*, the New Mexico Court of Appeals, citing *Vitale*, held that "[w]hen dispositive United States Supreme Court cases are decided after our own Supreme Court's cases, we follow the dispositive federal cases," and that "the jurisdictional exception is untenable in light of *Waller*." *State v. Manzanares*, 22 N.M. St. B. Bull. 954 (Ct. App. 1983), *rev'd by* 100 N.M. 621, 674 P.2d 511 (1983). In *Fugate*, the New Mexico Court of Appeals noted the "unmistakable

rejection by the United States Supreme Court of the *Diaz* 'jurisdictional exception'" and decided that "a jurisdictional exception does not exist." *State v. Fugate*, 101 N.M. 82, 83, 678 P.2d 710, 711 (Ct. App. 1983), *rev'd by* 100 N.M. 621, 674 P.2d 511 (1983), *aff'd by an equally divided court*, *Fugate v. New Mexico*, 470 U.S. 904 (1985).

Nevertheless, the New Mexico Court of Appeals invoked the doctrine in *State v. Hamilton*, 107 N.M. 186, 188, 754 P.2d 857, 859 (Ct. App. 1988), which allowed a retrial for aggravated assault despite an acquittal for the same offense, because the trial court lacked "proper jurisdiction" as a result of not having provided the defendant with counsel at a preliminary hearing. *Hamilton*'s holding prompted the Washington Court of Appeals in *Corrado* to flatly state, "We think *Hamilton* is wrong." *State v. Corrado*, 81 Wash. App. 640, 661, 915 P.2d 1121, 1133 (1996). In *Salaz v. Tansy*, 730 F. Supp. 369, 371-72 (D.N.M. 1989), the United States District Court for the District of New Mexico criticized the doctrine, rejected it, and provided a healthy list of other courts which had rejected it in light of *Blockburger*, *Waller*, *Brown*, and *Vitale*.

In *State v. Angel*, 132 N.M. 501, 502, 51 P.3d 1155, 1156 (2002), the New Mexico Supreme Court granted *certiorari* "to decide whether this Court should abandon its long-standing jurisdictional exception to the double jeopardy prohibition against successive prosecutions." The court did not reach the issue, however, concluding that jeopardy had not attached for a different reason– the prior charge (DWI) was dismissed before the defendant was sentenced. *Angel*, 132 N.M. at 504, 51 P.3d at 1158. Nevertheless, the court noted, in language reminiscent of *Corrado*, that "[t]he concept of 'attachment of jeopardy' arises from the idea that there is a point in a criminal proceeding at which the constitutional purposes and policies behind the Double Jeopardy Clause are implicated and the defendant is put at risk of conviction and punishment." *Angel*, 132 N.M. at 503, 51 P.3d at 1157.[17]

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[17] Although *Angel* did not cite *Corrado*, it referred to similar language in *Serfass v. United States*, 420 U.S. 377, 388-391 (1975) (pre-trial dismissal of an indictment did not constitute jeopardy).

Finally, in *State v. Rodriguez*, ____ N.M. ____, 116 P.3d 92, 102-03 (2005), the New Mexico Supreme Court decided to retain but limit the doctrine, holding it applicable where the prior conviction was the result of a guilty plea, but not where the conviction (or acquittal) was the result of a trial.[18] In a concurring opinion, Justice Chavez found the majority's distinction "to be without a meaningful difference" and indicated that he would "abolish the jurisdictional exception." *Rodriguez*, 116 P.3d at 104.

Two courts have held that the "jurisdictional exception" should not be applied where the court which conducted the first proceeding "exceeded" its jurisdiction. In *People v. Marks*, 1 Cal. 4th 56, 70, 820 P.2d 613, 620 (1991), the California Supreme Court held that jeopardy attached during a murder trial even though the trial court acted "in excess of jurisdiction" by trying the case without first conducting a competency hearing. In *People v. Manila*, 2005 Guam 6 (2005), the Supreme Court of Guam, citing *Marks*, and also citing the Georgia Supreme Court's 2003 *Perkins* opinion for the general proposition of a "jurisdictional exception," held that a trial court "exceeded its authority" in sentencing a defendant for a DUI as part of a probation revocation, but that jeopardy attached nonetheless. 2005 Guam at 24, 32.

Thus, while most courts have rejected the "jurisdictional exception" outright, others have offered up various tests for determining whether or not to apply it. *Corrado* would apply it only where the defendant was not at risk of conviction and punishment. *Marks* and *Manila* presumably would apply it if the convicting court had no jurisdiction at all, but not where the court merely "exceeded"

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[18] Though the Court granted *certiorari* "to reconsider [its] continued application of the jurisdictional exception" and discussed the doctrine at length, the Court's decision– that a second prosecution was not barred– was made on the ground that the offenses (larceny and obstructing an officer in the first court; tampering with evidence, contributing to the delinquency of a minor, and theft in the second) were not "the same offense" under the *Blockburger* test. 116 P.3d at 100-02.

its jurisdiction. *Rodriguez* would apply it if the prior conviction was the result of a guilty plea, but not where the prior disposition was the result of a trial. A dissenting Justice in *Rodriguez* would abolish it altogether. And of course *Perkins* would apply it universally in Georgia vehicular homicide cases pursuant to O.C.G.A. § 40-6-376(d).

C. The "equally divided" *Fugate*.

In *Fugate v. New Mexico*, 470 U.S. 904 (1985), this Court granted *certiorari* on the issue and was prepared to resolve it. But this Court's opinion in *Fugate*, other than noting that Justice Powell took no part, contains only one sentence: "The judgment is affirmed by an equally divided Court." In *Fugate*, the New Mexico Supreme Court had held that "the 'jurisdictional exception' . . . to double jeopardy . . . is still the law in New Mexico." *New Mexico v. Fugate*, 101 N.M. 58, 58, 678 P.2d 686, 686 (1984). This Court's "equally divided" opinion in *Fugate* is no precedent, *May v. State*, 726 S.W.2d 573, 577 (Tex. Crim. App. 1987), and serves only to illustrate the lack of precedent on the issue.

D. The clarity of the question.

This case is free from extraneous issues. The facts are clear, the law is clear, and the question is clear.

The facts are clear. The instant case is not cluttered with a "necessary facts exception." As noted above, the victim in *Diaz* died after the defendant's conviction of the lesser offense. In *Fugate*, too, the victim died after the misdemeanor conviction. *State v. Fugate*, 101 N.M. 82, 83, 678 P.2d 710, 711 (Ct. App. 1983), *rev'd by* 101 N.M. 58, 678 P.2d 686 (1984), *aff'd by an equally divided court*, *Fugate v. New Mexico*, 470 U.S. 904 (1985). Since the "necessary facts exception" is presumably a legitimate reason to deny a double

jeopardy claim,[19] its presence may be the reason this Court was unable to form a majority opinion in *Fugate*. In the instant case, however, Ms. Crider died immediately. Thus there is no "necessary facts exception" because at the time of Petitioner's plea and conviction, there was no lack of "necessary facts."

The law is clear. Under Georgia's statutory scheme, reckless driving is by definition a lesser included predicate offense of felony vehicular homicide. Tracking the statutory language of O.C.G.A. § 40-6-393(a) [A-30], count one of the indictment [A-4] charges Petitioner with causing the death of Ms. Crider "*through the violation of* O.C.G.A. § 40-6-390 [reckless driving] . . ." (emphasis supplied). *See also*, *Brock v. State*, 146 Ga. App. 78, 82, 245 S.E.2d 442, 445 (1978), which noted that in Georgia, vehicular homicide "may only be proved by proving violation of another statute [e.g., reckless driving]," which "makes the lesser included misdemeanor inseparable from the felony charge . . . for purposes of double jeopardy."

In previous cases before this Court where state law was not so clear, such as *Waller*, *Vitale*, *Burroughs*, and *Robinson v. Neil*, 409 U.S. 505 (1973) (holding *Waller* fully retroactive), this Court found it necessary to remand for a determination of whether the offenses involved in those cases were "the same" pursuant to *Blockburger* under the laws of Florida, Illinois, Georgia and Tennessee, respectively.[20] In *Dixon* the *Blockburger* analysis was "the main event."

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[19] *Diaz*; *Brown*; *Culberson*; *Mitchell* (*supra*, page 13, footnote 11).

[20] Mr. Waller's offenses were held not to be the same, and he was prosecuted and convicted again. *Waller v. State*, 270 So. 2d 26 (Fla. App. 1972), *cert. denied*, 414 U.S. 945 (1973). Mr. Burroughs and Mr. Robinson fared better. *State v. Burroughs*, 246 Ga. 393, 271 S.E.2d 629 (1980); *Robinson v. Neil*, 366 F. Supp. 924 (E.D. Tenn. 1973). No appellate record of *Vitale* appears following this Court's remand, but questions persisted in Illinois as to whether certain traffic offenses were "included" in charges involving death from a resulting automobile accident. *See Illinois v. Zegart*, 452 U.S. 988 (1981) (Chief Justice Burger, dissenting from denial of *certiorari*); *People v. Jackson*, 118 Ill. 2d 179, 514 N.E.2d 983 (1987).

Here, however, no *Blockburger* analysis is necessary. It is undisputed that, under Georgia law, reckless driving is a lesser included offense of vehicular homicide. Therefore, as the Georgia Court of Appeals correctly noted, "[t]he State does not contest that, but for the application of O.C.G.A. § 40-6-376(d), the instant prosecution would be barred on former jeopardy grounds." *State v. Perkins*, 256 Ga. App. 855, 569 S.E.2d 910, 911 (2002). [A-11]

Thus the question of the "jurisdictional exception" to double jeopardy is clearly presented to this Court through the law and the facts of this case.

It is by no means the first time the question has been asked. As noted above (page 12), Justice Miller posed it more than a century ago, writing for the majority in *Ex Parte Lange*, 85 U.S. 163 (1874). He asked whether a sentence which was "so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force" would bar "another judgment on the same conviction." The question was merely hypothetical, however, and the justice declined to answer. "On this," he wrote, "we have nothing to say, for we have no such case before us." *Lange*, 85 U.S. at 174.

Here, because the Probate Court's sentence was rendered on a charge generally within its jurisdiction and was apparently valid, no one could maintain, in the words of *Lange*, that the judgment was "so void" that Petitioner was at "perfect liberty" to disregard its terms, or that the probation officer "would be liable" for enforcing it. The State successfully argued, however, that the Probate Court's judgment and its fully served sentence were "null and void" and without double jeopardy consequences.

Justice Miller's 131-year-old question is finally at hand.

Question 3. Is O.C.G.A. § 40-6-376(d) unconstitutional on its face under the Double Jeopardy Clause, where the statute was drafted for the sole purpose of enabling the State to disregard an apparently valid conviction and a fully served sentence, so that the State might prosecute, convict, and punish a defendant again for the same offense?

A. A statute to "block *Blockburger.*"

The statute's phrase, "which offense arose out of the same conduct which led to said person's being charged with O.C.G.A. § 40-6-393," describes a *lesser included offense* of O.C.G.A. § 40-6-393 (vehicular homicide). Thus the statute applies whenever the State has prosecuted a person for any offense which is *included* in O.C.G.A. § 40-6-393. Ordinarily that would trigger *Blockburger* and bar a second prosecution. But under O.C.G.A. § 40-6-376(d), the court in which the person was prosecuted for the lesser offense is said to have had "no jurisdiction," and *voilà*, the "same elements test" is rendered irrelevant. *Blockburger* is "blocked."

B. A statute to circumvent *Pearce* via a legal fiction– the prior conviction and punishment that "legally didn't happen."

Georgia, like all states, has a multi-tiered trial court system. Georgia's consists of superior, state, magistrate, probate and municipal courts. In any such system, a state may, on occasion, "inadvertently" prosecute a person for a lesser included offense in a lower court. The state's improvident action then frustrates its desire to prosecute the person for a greater offense arising out of the same facts, pursuant to well-established principles of double jeopardy. While this scenario may occur infrequently, it occurs with sufficient regularity that it reached this Court in *Diaz*, *Brown*, *Waller*, *Robinson*, *Vitale*, *Burroughs*, and *Fugate*.

Instead of managing its cases in such a way as to prevent such "inadvertent" prosecutions, the State of Georgia has chosen to deal with the problem through a statute which creates a legal fiction– that a previous prosecution, conviction and fully served sentence "legally didn't happen." Indeed, in the Superior Court the District Attorney argued:

> "what happened . . . did not happen from a legal standpoint" (T2.10); "as if it never occurred" (T2.16); "there was no action in the Probate Court legally in this state" (T2.17); "It did not occur" (T3.8); "From a legal standpoint, nothing occurred in the Probate Court" (R.148); "From a legal standpoint, it never happened." (R.156)

Since the first prosecution and its effects "legally didn't happen," the State is then free to prosecute the person again and to seek another conviction and another punishment, and thus to circumvent the double jeopardy protections this Court set forth in *North Carolina v. Pearce*, 395 U.S. 711 (1969).[21] The scheme[22] is disingenuous, illegitimate and unconstitutional.

A statute is unconstitutional "on its face" only if it has *no* constitutional purpose. *United States v. Jackson*, 390 U.S. 570 (1968). It might be argued that the statute's purpose is simply to allocate jurisdiction among courts. But, if that were so, there would be no need for its phrase, "any judgment rendered by such court shall be null and void." It is this phrase upon which the State based its successful claim that the previous prosecution, conviction and punishment "legally didn't happen."

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[21] The statute's intent to evade double jeopardy protections with a second prosecution is perhaps explained by a footnote in a brief by the District Attorney– O.C.G.A. § 40-6-376(d) was drafted not by a legislator, but by a prosecutor.

[22] "No person's life, liberty or property are safe when the legislature is in session."– Mark Twain.

In a brief to the Georgia Supreme Court, Petitioner suggested a construction, derived from the Court's own words in its first opinion, which would have endowed the statute with one legitimate constitutional purpose– to "prevent the scenario" which occurred here. *State v. Perkins*, 276 Ga. 621, 623, 580 S.E.2d 523, 525 (2003). [A-21] The District Attorney, however, insisted that "the purpose of the statute is not to prevent such a scenario from occurring, but to correct the result when it occurs." Following that argument, the Georgia Supreme Court in its second opinion said nothing of prevention, but instead approved the statute to enable a second prosecution. *Perkins v. State*, 279 Ga. 506, 506-07, 614 S.E.2d 92, 92-93 (2005). [A-26]

In any event, the statute certainly did not "prevent the scenario." The Sheriff's Department acted to prosecute Petitioner, the Court acted to convict him, and the Court's Probation Office acted to punish him. To allow the State to pursue a second prosecution on the ground that its first prosecution was "unlawful" or "unauthorized" would be "very much like permitting a party to take advantage of its own wrong." *United States v. Ball*, 163 U.S. 662, 668 (1896).

Thus O.C.G.A. § 40-6-376(d) serves not to prevent "inadvertent prosecutions" or to deprive lower courts of jurisdiction, but to deprive defendants of the double jeopardy protections this Court defined in *Blockburger* and *Pearce*.

A state legislature has no business carving out exceptions to the provisions of our Constitution. But O.C.G.A. § 40-6-376(d) does just that, as it transparently exploits the all-but-defunct "jurisdictional exception" to our Double Jeopardy Clause.

SUMMARY OF REASONS TO GRANT THE WRIT

The question of a "jurisdictional exception" to double jeopardy was raised but not answered 131 years ago in *Ex Parte Lange*, 85 U.S. 163 (1874). It was given life, quite gratuitously, by *Diaz v. United States*, 223 U.S. 442 (1912).

Blockburger v. United States, 284 U.S. 299 (1932), should have dispatched it 73 years ago, but the doctrine lives on, notwithstanding *Blockburger*'s reinforcement by *Waller v. Florida*, 397 U.S. 387 (1970); *Brown v. Ohio*, 432 U.S. 161 (1977); and *Illinois v. Vitale*, 447 U.S. 410 (1980). This Court granted *certiorari* on the issue in *Fugate v. New Mexico*, 470 U.S. 904 (1985), but was unable to form a majority opinion, perhaps due to an extraneous issue not present here.

Georgia has resurrected the doctrine in statutory form, creating a legal fiction which enables the State to seek a second conviction and a second punishment despite the prohibitions set forth in *North Carolina v. Pearce*, 395 U.S. 711 (1969). If Georgia can enact a statute which creates a "jurisdictional exception" in vehicular homicide cases, *any* state can enact a statute which would apply to *any* case where the *Blockburger* "same elements test" would bar a second prosecution.

This Court is presented with an opportunity to rule upon– and reject– both the doctrine and the Georgia statute which exploits it. Neither has any place in modern double jeopardy jurisprudence.

CONCLUSION

Petitioner William Thomas Perkins respectfully requests that this Honorable Court grant his petition for *certiorari*.

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APPENDIX

IN THE PROBATE COURT
OF WHITFIELD COUNTY

State of Georgia vs.
Perkins, William Thomas
Defendant

Docket No.	Offense	Plea	Fine
134992	Reckless Driving	G	85.00

SENTENCE

The above-named Defendant having pled to the above - stated offense, it is therefore ORDERED AND ADJUDGED by the court that: said defendant is hereby sentenced to /3 mo./ REPORTING PROBATION. You will be provided a copy of all rules and regulations that are explained to you.

CONDITIONS OF PROBATION

The Defendant, having been granted the privilege of serving all of part of the above stated sentence on probation, hereby is sentenced to the following general conditions of Probation checked below:

1. Do not violate the criminal laws of any governmental unit.
2. Avoid injurious and vicious habits– especially alcoholic intoxication and narcotics and other dangerous drugs unless lawfully prescribed.
3. Avoid persons or places of disreputable character.
4. Report to the Probation Supervisor as directed.

5. Probationer shall serve _____ in jail at the direction of the Probation Supervisor and/or other court officials.
6. Do not change his/her address, move outside the jurisdiction of the Curt, or leave the State for any period of time without prior permission of the Probation supervisor.
7. Probationer shall be subject to a daily random drug/alcohol screen at any time by the Probation Supervisor.
8. Probationer will complete _____ hours of Community Service Work at the direction of the Probation Supervisor.
9. Probationer will pay $30.00 per month probation supervision fee.

. . . .

IT IS SO ORDERED this 7th day of Nov., 2000.

/S/ Robert Smalley
Judge, Probate Court of
Whitfield County

The above sentence and conditions of probation and all other questions I had, have been explained to me.

11-7-00	/S/ W. Tommy Perkins	/S/ Lisa Dyer
Date	Defendant	Probation Officer

All sentences are consecutive unless stated otherwise.

Failure to comply with court order will result in warrant.

[handwritten:] /Consecutive to pending charges/

SPECIAL PRESENTMENT
No. 44,048-T
Whitfield Superior Court
January Term, 2001

The State of Georgia
vs.
William Thomas Perkins

[Clerk's Stamp:]
Filed April 24, 2001
Betty Nelson, Clerk

Ct. 1: Homicide by Vehicle in the First Degree - F
Ct. 2: Reckless Driving - M

/True/ Bill
/S/ Horace Moore, Foreman

[Count 1]

The grand jurors selected, chosen and sworn for the County of Whitfield, to wit: [names of grand jurors]

In the name and on the behalf of the citizens of Georgia, charge and accuse William Thomas Perkins with the offense of HOMICIDE BY VEHICLE IN THE FIRST DEGREE for that the said accused in the County of Whitfield and the State of Georgia on the 2nd day of November, 2000, did, without malice aforethought, cause the death of another person, to wit: Brenda Joyce Crider, through the violation of O.C.G.A. § 40-6-390, in that he did operate a motor vehicle, to wit: a Mack dump truck, on and over the road and highway known as Georgia Highway 71 in reckless disregard for the safety of persons and property by driving at excessive speed, weaving in and out of traffic, and following too closely, contrary to the laws of said State, the good order, peace and dignity thereof.

Count 2

And the grand jurors, aforesaid, in the name and on the behalf of the citizens of Georgia, charge and accuse William Thomas Perkins with the offense of RECKLESS DRIVING for that the said accused in the County of Whitfield and the State of Georgia on the 2nd day of November, 2000, did drive a vehicle on and over the road and highway known as Georgia Highway 71 in reckless disregard for the safety of persons and property, by driving a Mack dump truck at excessive speed, weaving in and out of traffic, and following too closely, contrary to the laws of said State, the good order, peace and dignity thereof.

KERMIT McMANUS, District Attorney
SPECIAL PRESENTMENT

IN THE SUPERIOR COURT OF WHITFIELD COUNTY

STATE OF GEORGIA

State of Georgia	Criminal Case No. 44,048-T
vs.	
	[Clerk's Stamp:]
William Thomas Perkins, Defendant	Filed Sept. 20, 2001 Betty Nelson, Clerk

ORDER SUSTAINING PLEA OF FORMER JEOPARDY

The charges in the indictment in the above-styled case arose from an automobile collision which occurred on November 2, 2000, and which resulted in the death of Brenda Joyce Crider. Defendant William Thomas Perkins is charged in Count 1 with First Degree Vehicular Homicide, and in Count 2 with Reckless Driving.

On November 7, 2001, Defendant was prosecuted in the Probate Court of Whitfield County, on a charge of Reckless Driving, which was set forth in Uniform Traffic Citation No. 134990. The charges in the Uniform Traffic Citation were based upon the same material facts as those set forth in Count 2 of the instant indictment. In the Probate Court proceeding on November 7, 2000, Defendant pled guilty to said Reckless Driving charge, and was sentenced to a fine, which he paid, and three (3) months probation, which he served.

The indictment in the above-styled case was rendered on April 24, 2001. Defendant filed a Plea of Former Jeopardy at the time of arraignment on July 2, 2001. On July 16, 2001,

the Court held an evidentiary hearing on the Plea of Former Jeopardy, and the parties entered into a stipulation of certain facts. Upon consideration of the evidence and stipulated facts, and the written arguments and motions of the parties, the Court hereby makes the following findings of fact and conclusions of law:

The Reckless Driving charge for which Defendant was previously prosecuted in Probate Court is the same offense as the Reckless Driving charge listed in Count 2 of the instant indictment. Therefore prosecution of Count 2 is barred by the double jeopardy clauses of the United States and Georgia Constitutions, and O.C.G.A. § 16-1-8(a)(1).

The Reckless Driving charge for which Defendant was previously prosecuted in Probate Court is a lesser included offense of the Vehicular Homicide charge listed in Count 1 of the indictment. O.C.G.A. § 16-1-6; O.C.G.A. § 40-6-390; O.C.G.A. § 40-6-393(a); *Brock v. State*, 146 Ga. App. 78 (1978). A conviction on a lesser-included offense bars subsequent trial on the greater offense, under the double jeopardy clauses of the United States and Georgia Constitutions. *Illinois v. Vitale*, 447 U.S. 410 (1980); *State v. Burroughs*, 246 Ga. 393 (1980); *State v. Williams*, 214 Ga. App. 701 (1994). O.C.G.A. § 16-1-7(a)(1) also bars a subsequent prosecution where "one crime is included in the other." See *State v. Estevez*, 232 Ga. 316 (1974). Thus, since Defendant has previously been prosecuted and convicted for an offense which is included in the Vehicular Homicide charge set forth in Count 1, the prosecution of that charge is also barred.

The State's sole argument is based on O.C.G.A. § 40-6-376(d), which purports to deprive a court of jurisdiction over an offense which "arose out of the same conduct which led to" a charge under O.C.G.A. § 40-6-393 (Vehicular Homicide)

unless that Court had jurisdiction over violations of O.C.G.A. § 40-6-393.

The Probate Court does in fact have jurisdiction over violations of O.C.G.A. § 40-6-393. O.C.G.A. § 40-6-376(d) does not distinguish between felonies and misdemeanors. The Probate Court has jurisdiction over misdemeanor traffic offenses, including violations of O.C.G.A. § 40-6-393(b), and O.C.G.A. § 40-6-390 (Reckless Driving). O.C.G.A. § 15-9-30(b)(8); O.C.G.A. § 40-13-21(a). Therefore O.C.G.A. § 40-6-376(d) does not deprive the Probate Court of jurisdiction over the Reckless Driving charge which it heard on November 7, 2001, and the resulting conviction, based upon Defendant's guilty plea, is valid. Therefore the state's motion to rule the Probate Court conviction "null and void" is denied.

This Court having determined that O.C.G.A. § 40-6-376(d) is not applicable to the facts of this case, the Court does not find it necessary to address Defendant's contentions regarding the constitutionality of said statute.

THEREFORE, it is hereby ORDERED and ADJUDGED that Defendant's PLEA OF FORMER JEOPARDY is hereby granted and sustained. The charges in the instant indictment are hereby DISMISSED, and the state is forever barred from further prosecuting said charges or any other charges against Defendant based upon the same material facts.

This the 20th day of September, 2001.

/S/ Coy H. Temples
Judge of Superior Court
Conasauga Judicial Circuit

Order prepared by:
/S/ Ralph M. Hinman
Attorney for Defendant

Approved as to form:
/S/ Kermit N. McManus
District Attorney

WHOLE COURT

JULY 15, 2002
In the Court Appeals of Georgia
A02A0599. THE STATE v. PERKINS.

ELLINGTON, Judge.

The State appeals an order of the Whitfield County Superior Court sustaining William Thomas Perkins' plea of former jeopardy and barring the instant vehicular homicide prosecution. Because this prosecution is barred by Perkins' prior conviction of the underlying lesser included offense of reckless driving, we affirm.

1. On November 2, 2000, Perkins was involved in an automobile collision that resulted in the death of Brenda Joyce Crider. A sheriff's deputy arrested Perkins and charged him in separate citations with vehicular homicide and reckless driving. Even though the deputy wrote "Superior Court" on the reckless driving citation, the Whitfield County Probate Court processed the citation instead of binding it over. On November 7, 2000, deputies took Perkins from jail to answer the reckless driving charge. Without benefit of counsel, 18-year-old Perkins pleaded guilty to the charge and was convicted of the offense.

On April 24, 2001, the District Attorney indicted Perkins for reckless driving, OCGA § 40-6-390(a), and for felony vehicular homicide, OCGA § 40-6-393(a). At arraignment, Perkins filed a plea in bar on former jeopardy grounds. The District Attorney responded with a motion to set aside Perkins' prior reckless driving conviction based upon OCGA § 40-6-376(d). The trial court sustained the plea in bar and the State timely brought this appeal under OCGA §5-7-1(a)(3).

The State does not contest that, but for the application of OCGA § 40-6-376, the instant prosecution would be barred on former jeopardy grounds. As the superior court correctly found, Perkins' reckless driving conviction is a lesser-included offense of the vehicular homicide offense for which he was indicted. *Brock v. State*, 146 Ga. App. 78, 82 (245 SE2d 442) (1978); OCGA §§ 16-1-6; 40-6-390; 40-6-393(a). "[A] conviction on a lesser-included offense bars subsequent trial on the greater offense." (Citations and punctuation omitted.) *State v. Burroughs*, 246 Ga. 393, 394 (271 SE2d 629) (1980); see also OCGA §§ 16-1-7(a)(1); 40-6-376(c). The State contends, however, that applying OCGA § 40-6-376(d), Perkins' reckless driving conviction is "null and void" and therefore does not trigger double jeopardy protection.

The State argues that because the Whitfield County Probate Court lacked jurisdiction to try Perkins on his felony vehicular homicide citation,[1] it also lacked jurisdiction to try him on the underlying, lesser included misdemeanor reckless driving charge which arose out of the same events. Unfortunately, the plain language of OCGA § 40-6-376(d) does not support this argument. The statute provides:

> No court, *other than a court having jurisdiction to try a person charged with a violation of Code Section 40-6-393*, shall have jurisdiction over any offense arising under the laws of this state or the ordinances of any political subdivision thereof, which offense arose out of the same conduct which led to said person's being charged with a violation of Code Section

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[1] The Whitfield County Probate Court has jurisdiction over misdemeanor traffic offenses only. OCGA § 40-13-21(a).

> 40-6-393 and any judgment rendered by such court shall be null and void.

(Emphasis supplied.) OCGA § 40-6-376(d). Because the Whitfield County Probate Court has jurisdiction to try misdemeanor vehicular homicide cases charged under OCGA § 40-6-393(b), the probate court is, by definition, included among the courts "having jurisdiction to try a person charged with a violation of Code Section 40-6-393." OCGA § 40-6-376(d). Because the legislature made no distinction between misdemeanor and felony grades of vehicular homicide under OCGA § 40-6-393 when it drafted OCGA § 40-6-376(d), we must assume that it intended to include both grades. By its plain language, OCGA § 40-6-376(d) did not divest the Whitfield County Probate Court of jurisdiction to try Perkins on the reckless driving charge. Accordingly, Perkins' reckless driving conviction was not "null and void," and the trial court properly sustained Perkins' plea in bar.

2. Perkins' conditional motion to transfer this case to the Supreme Court is denied.

Judgment affirmed. Andrews, P.J. and Barnes, J., concur. Pope, P. J. and Smith, P. J., concur specially. Ruffin and Eldridge, JJ., dissent.

POPE, Presiding Judge, concurring specially.

I am constrained to agree with the result reached by the majority in this case, but do so reluctantly because I do not believe that the legislature intended the result here. To the contrary, I agree with the dissent that OCGA § 40-6-376 was enacted to avoid such a result. But I cannot agree with the dissent that the statute as written can be construed to effectuate that intent. Certainty of legislative intent cannot compensate for omissions or oversights in statutory drafting– we must abide by the statute as it is plainly written. Here, as the majority notes, the legislature failed to distinguish between misdemeanor and felony grades of vehicular homicide when it drafted OCGA § 40-6-376, and we cannot rewrite the statute to make such a distinction. This is a job for the General Assembly, not the courts.

I am authorized to state that Presiding Judge Smith joins in this special concurrence.

ELDRIDGE, Judge, dissenting.

I respectfully dissent from the majority. The plain language of the statute demands the construction that the legislature obviously intended when the law was enacted twenty years ago.[1]

"The initial rule of statutory construction is to look to the legislative intent and to construe statutes to effectuate that intent. OCGA § 1-3-1(a)."[2] With this principle in mind, OCGA § 40-6-376(d) was enacted to prevent the type of

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[1] Ga. L. 1982, p. 1694, § 2(d).

[2] *Mikell v. State*, 270 Ga. 467, 468 (510 SE2d 523) (1999).

scenario presented by this case, i.e., instances where– whether by inadvertence or chicanery– the lesser offense underlying a vehicular homicide gets separated from the homicide and disposed of in another court, thereby preventing prosecution on the vehicular homicide because of double jeopardy. From the plain meaning of the statute, the legislature intended that only a court with the jurisdiction to try a person on the vehicular homicide with which he is charged should be able to dispose of the offense underlying that charge. And, so, the statute states:

> No court, other than court having jurisdiction *to try a person charged* with a violation Code Section 40-6-393, shall have jurisdiction over any offense . . . which arose out of the same conduct which led to *said person's being charged* with a violation of OCGA § 40-6-393 and any judgment rendered by such court shall null and void.[3]

The plain language of OCGA § 40-6-376(d) goes to a court's ability *to try a person who has been charged* with a vehicular homicide violation. The language in the statute twice referring to *a person charged* with a violation cannot simply be ignored as mere surplusage.[4] And, although the special concurrence urges otherwise, it is not "rewriting the statute" to give meaning to all parts in order effectuate the legislative intent. On the contrary, to ignore the plain language "*to try a person charged with* a violation of code section 40-6-393" and interpret the statute as stating "to try a violation of Code Section 40-6-393," as the majority does, is to "rewrite the statute." In my view, it is no answer at all to unnecessarily

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[3] (Emphasis supplied.) OCGA § 40-6-376(d).

[4] *Tolbert v. Maner*, 271 Ga. 207, 208 (518 SE2d 423) (1999).

reverse a criminal conviction, and then lay the onus on the General Assembly to rewrite a statute that has needed no revision for twenty years and which could still serve if the plain language thereof was honored. To me, the incongruity lies not in the language in the statute, but the current interpretation of this court.

In that regard, the heart of the majority's reasoning is, and I quote from the majority,

> [(1) since the] Probate Court has jurisdiction to try *misdemeanor* vehicular homicide cases charged under OCGA § 40-6-393(b), [then, (2),] the probate court is, by definition, included among the courts 'having jurisdiction to try *a person charged* with a violation of Code Section 40-6-393.[5]

However, the majority's premise (1) is a statement of subject matter jurisdiction over a general class of case, but the majority's conclusion (2) addresses the specific jurisdiction to try *a person charged* with a violation of vehicular homicide. This syllogism is invalid because the probate court is not "by definition included among the courts" with jurisdiction to try a person charged with felony violation of OCGA § 40-6-393. The majority's analysis begs the question that the statute requires the courts to ask in order to determine jurisdiction, "What is the violation a person has been charged with?" This is because OCGA § 40-6-376(d) serves to *divest* a court of jurisdiction it might otherwise have, not confer it. And, as the statute states, the distinction is in the violation charged against a person.

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[5] (Emphasis supplied.) Majority Opinion p. 3-4.

> Jurisdiction of the subject-matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases *to which that particular case belongs*. As applied to the subject-matter of a suit, jurisdiction is always conferred by law, and . . . if the pleadings state a case belonging to a general class *over which the authority of the court extends*, then jurisdiction attaches and the court has power to hear and determine the issues involved.[6]

In a criminal prosecution, the general class of case is identified by the charge.[7] So, although a probate court may have general jurisdiction over *misdemeanor* vehicular homicides, as the majority asserts, whether the Whitfield County Probate Court is "a court having jurisdiction to try a person charge with a violation of Code Section 40-6-393" depends exclusively on the charge against the person. And it is the statute's focus on the vehicular homicide violation with which a person has been charged that makes the distinction between "misdemeanor" and "felony" that the majority finds lacking. The statute's plain language, "a court with *jurisdiction to try a person charged* with a violation of Code Section 40-6-393," serves to divest a probate court of jurisdiction over an underlying misdemeanor offense when a person has been charged with a felony violation of 40-6-393.[8]

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[6] (Citations omitted; emphasis supplied.) *Nicholson v. State*, 261 Ga. 197, 199 (4) (403 SE2d 42) (1991).

[7] See, e.g., Id at 200(5)(b) (general class of case identified as "state traffic misdemeanor.").

[8] The General Assembly is empowered by the Constitution to define the jurisdiction of the state courts (Ga. Const. 1983, Art. VI, Sec. III, Par. I).

In this case, Perkins was simultaneously charged with felony vehicular homicide under OCGA § 40-6-393(a)[9] and with misdemeanor reckless driving. The probate court disposed of the misdemeanor reckless driving offense, with its sentence to run consecutive to any sentence imposed on the pending charge of felony vehicular homicide. The probate court had no authority to dispose of the reckless driving offense, since it did not have jurisdiction to try Perkins on the charge of felony vehicular homicide, as required by OCGA § 40-6-376(d). Accordingly, the probate court's judgment entered on the reckless driving conviction is wholly void, and Perkins may be tried on the vehicular homicide.[10] The grant of Perkins' plea in bar should be reversed.

I am authorized to state that Judge Ruffin joins in this dissent.

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[9] Reckless driving was charged as the underlying offense, rendering the vehicular homicide a felony. See OCGA § 40-6-393(b).

[10] OCGA § 40-6-376(d). See OCGA § 17-9-4.

In the Supreme Court of Georgia
Decided: May 5, 2003
S02G1850. THE STATE v. PERKINS

Carley, Justice.

William Thomas Perkins was charged in separate citations with felony vehicular homicide and reckless driving, both of which crimes arose out of the same automobile collision. Where a death is caused by reckless driving, the offense is felony vehicular homicide. OCGA § 40-6-393(a). Perkins pled guilty in probate court to reckless driving and was convicted of only that offense. Thereafter, the grand jury indicted Perkins for felony vehicular homicide and for the underlying reckless driving offense. He filed a plea in bar on the ground of former jeopardy, and the State moved to set aside the prior reckless driving conviction in probate court pursuant to OCGA § 40-6-376(d), which provides the following:

> No court, other than a court having jurisdiction to try a person charged with a violation of Code Section 40-6-393, shall have jurisdiction over any offense . . . which . . . arose out of the same conduct which led to said person's being charged with a violation of Code Section 40-6-393 and any judgment rendered by such court shall be null and void.

The trial court sustained the plea in bar, and the Court of Appeals affirmed, holding that Perkins' reckless driving conviction was not null and void under this statute, because the probate court had jurisdiction to try misdemeanor vehicular homicide cases charged under subsection (b) of OCGA § 40-6-393. *State v. Perkins*, 256 Ga. App. 855, 856 (1) (569 SE2d 910) (2002) (two judges concurred specially). Two judges

dissented, opining that, because the specific focus of the statute is on the charge against a specific person, it divests a probate court of jurisdiction over an underlying misdemeanor offense, such as reckless driving, when that person has been charged with felony vehicular homicide. *State v. Perkins*, supra at 857-859 (Eldridge, J., dissenting). We granted *certiorari* to determine whether the Court of Appeals erred in construing OCGA § 40-6-376(d). Because the dissenting judges correctly interpreted this statute, we reverse the judgment of the Court of Appeals.

In order to discern the meaning of the words of a statute, a court "must look at the context in which the statute was written, remembering at all times that 'the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes.' [Cit.]" *Busch v. State*, 271 Ga. 591, 592 (523 SE2d 21) (1999).

A probate court is not invested with broad "jurisdiction to try a person charged with a violation of Code Section 40-6-393 . . . ." OCGA § 40-6-376(d). Instead, it has limited jurisdiction to try some persons, but not others, who are charged with that crime. Whether the probate court meets the description contained in OCGA § 40-6-376(d) "depends exclusively on the charge against the person." *State v. Perkins*, supra at 858 (Eldridge, J., dissenting). The determinative factor is whether the vehicular homicide charge is a felony under subsection (a) of OCGA § 40-6-393 or a misdemeanor under subsection (b). OCGA § 40-13-21(a). Thus, the applicability of OCGA § 40-6-376(d) to a probate court hinges on the distinction between felony and misdemeanor grades of vehicular homicide. Where, as here, a person is charged with felony vehicular homicide, the probate court does not have jurisdiction to try the person for that

charge, and the code section's restrictions on jurisdiction over underlying offenses apply.

This analysis is confirmed by the statute's subsequent reference to a court's lack of jurisdiction over any offense arising "out of the same conduct which led to *said person's* being charged with a violation of Code Section 40-6-393. . . ." (Emphasis supplied.) OCGA § 40-6-376(d). "The word 'said,' when used as an adjective, means 'aforementioned.'" *Aguilar v. State*, 621 S.W.2d 781, 783 (Tex. Crim. App. 1981). See also Black's Law Dictionary, p. 1337 (7th ed. 1999). Thus, the statute narrowly divests a court of jurisdiction over certain underlying traffic offenses charged against the particular person whose vehicular homicide charge cannot also be considered by that court.

Furthermore, we broadly construe the word "charged" in OCGA § 40-6-376(d), in accordance with its ordinary meaning in criminal contexts, to refer to an "[a]ccusation of crime by complaint, indictment, or information." Black's Law Dictionary, p. 212 (5th ed. 1979). "[A] uniform traffic citation and complaint form . . . . shall serve as the citation, summons, accusation, or other instrument of prosecution of the offense or offenses for which the accused is *charged* . . . ." (Emphasis supplied.) OCGA § 40-13-1. Thus, an accused is "charged" with an offense as soon as a uniform traffic citation is issued. Accordingly, the issuance of a uniform traffic citation and complaint form charging Perkins with felony vehicular homicide clearly triggered the jurisdictional limitations in OCGA § 40-6-376(d). The fact that an indictment was later necessary under OCGA §§ 17-7-70(a) and 40-13-3 in order to bring Perkins to trial for the violation of OCGA § 40-6-393(a) did not destroy the validity of the uniform traffic citation as the initial charging document. See OCGA § 40-13-3. The citation for felony vehicular homicide was not void, but merely expired

and was superseded as the charging instrument by the indictment. See *Smith v. State*, 239 Ga. App. 515, 517 (2) (521 SE2d 450) (1999); *Ramsey v. State*, 189 Ga. App. 91, 94 (375 SE2d 63) (1988). Therefore, pursuant to OCGA § 40-6-376(d), the probate court never acquired jurisdiction to try Perkins for reckless driving.

Even assuming OCGA § 40-6-376(d) to be ambiguous, the courts must keep "in mind the purpose of the statute [cits.] and "'the old law, the evil, and the remedy." OCGA § 1-3-1(a).' [Cits.]" *Busch v. State*, supra at 592. The purpose of OCGA § 40-6-376(d) is undoubtedly to prevent the scenario where, as here, whether by inadvertence or chicanery, "the lesser offense underlying a vehicular homicide gets separated from the homicide and disposed of in another court, thereby preventing prosecution on the vehicular homicide because of double jeopardy." *State v. Perkins*, supra at 857 (Eldridge, J., dissenting). This purpose applies equally regardless of whether, as here, the court which disposes of the underlying offense is without jurisdiction to try the person charged with vehicular homicide because it is of felony grade or whether the court has no jurisdiction with respect to any grade of vehicular homicide. In either case, the old law, as stated in *Brock v. State*, 146 Ga. App. 78 (245 SE2d 442) (1978), is just as problematic, and the same remedy is equally appropriate.

For double jeopardy purposes, vehicular homicide and reckless driving are the same offense. *Brock v. State*, supra. However, under the jurisdictional exception to the bar of former jeopardy, "'[a] party who has been tried and convicted by a court not having jurisdiction of the offense cannot plead prior jeopardy if subsequently indicted for the same offense in a court having jurisdiction thereof.' [Cits.]" *State v. Ramsey*, 143 Ga. App. 191-192 (237 SE2d 666) (1977). See also *Prock v. State*, 246 Ga. App. 703 (541 SE2d 685) (2000); *State v.*

Manzanares, 100 N.M. 621, 674 P.2d 511 (N.M. 1983); Anno., 4 ALR3d 874, § 4 [a]; Anno., 75 ALR2d 683, § 5. Compare *Hall v. Matthews*, 210 Ga. 401, 402 (80 SE2d 167) (1954), disapproved on other grounds, *Deyton v. Wanzer*, 240 Ga. 509, 510 (241 SE2d 228) (1978). Under OCGA § 40-6-376(d), as properly construed, the judgment entered by the probate court on the reckless driving charge against Perkins is "null and void." Accordingly, the trial court erred in sustaining the plea in bar based upon an incorrect interpretation of OCGA § 40-6-376(d), and the Court of Appeals erred in affirming that erroneous ruling.

The record shows, however, that Perkins challenged the constitutionality of OCGA § 40-6-376(d) on grounds which the trial court did not have to address, because of its determination that the statute did not apply. In light of our reversal of the ruling on the question of statutory construction, we direct the Court of Appeals to remand this case to the trial court for consideration and resolution of any constitutional issues which were properly raised by Perkins, but which were not ruled upon. *Collins v. Adam Cab*, 261 Ga. 305, 307 (2) (404 SE2d 560) (1991); *Board of Commissioners of Henry County v. Welch*, 253 Ga. 682, 684 (2) (324 SE2d 178) (1985); *Department of Medical Assistance v. Columbia Convalescent Center*, 203 Ga. App. 535, 536 (2) (417 SE2d 195) (1992).

Judgment reversed and case remanded with direction. All the Justices concur.

IN THE SUPERIOR COURT OF WHITFIELD COUNTY

STATE OF GEORGIA

State of Georgia	Criminal Case No. 44,048-M
vs.	
William Thomas Perkins, Defendant	[Clerk's Stamp:] Filed March 25, 2004 Betty Nelson, Clerk

ORDER

Procedural Posture

On November 2, 2000, the Defendant Tommy Perkins was involved in a traffic accident, which resulted in the death of Brenda Joyce Crider. As result of the accident, the defendant was cited for reckless driving and felony vehicular homicide in two separate traffic citations. On November 7, 2000, the Defendant appeared before the Whitfield County Probate Court only on the reckless driving charge. The Defendant pled guilty to the reckless driving charge and was sentenced to three months probation and paid fines and fees totaling $184.00.

On April 24, 2001, the Grand Jury in Whitfield County indicted the Defendant on the charges of the reckless driving and vehicular homicide based upon the incident, which occurred on November 2, 2000. The Defendant entered a plea of former jeopardy at his arraignment on July 2, 2001. The Defendant also filed a motion challenging the constitutionality of O.C.G.A. § 40-6-376(d). The constitutionality of the statute was challenged on the grounds of (1) double jeopardy, (2) the

ex post facto clause of the Georgia and U.S. Constitutions, and (3) the separation of powers clause of the Georgia Constitution. After an evidentiary hearing, Judge Temples sustained the Defendant's Plea of Former Jeopardy.

The Georgia Court of Appeals sustained the ruling, but the Georgia Supreme Court overturned it. In its ruling, the Georgia Supreme Court held that the plea entered in Probate Court was "null and void" because the Probate Court lacked subject matter jurisdiction. Since the Probate Court did not have jurisdiction, jeopardy never attached. The Georgia Supreme Court remanded the case back to this Court to consider the resolution of any constitutional issues which were properly raised by the Defendant but which were not ruled upon. As the Georgia Supreme Court has clearly addressed the issue of double jeopardy, this Court will only consider the ex post facto and separation of powers arguments raised by the Defendant in his motion in determining the constitutionality of O.C.G.A. § 40-6-376(d) (2003).

Legal Analysis

The Defendant first argues that the interpretation of O.C.G.A. § 40-6-376(d) adopted by the Courts acts as an ex post facto law and retroactively punishes him. The Defendant misinterprets the scope of the ex post facto clause. The ex post facto clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government [Citation Omitted]." *Marks v. U.S.*, 430 U.S. 188, 191 (1977). Since the ex post facto clause does not apply to the judiciary, the Defendant's claim is without merit.

The Defendant also argues that the Legislature exceeded its authority and violated the principal of separation of powers when it enacted O.C.G.A. § 40-6-376(d). Under the

Georgia Constitution, the legislative branch is vested with authority to set the jurisdictional limits of the probate court. Ga. Const. Art VI, § III, ¶ I. Therefore, the Georgia General Assembly was within its authority when it limited the jurisdiction of the probate court in O.C.G.A. § 40-6-376(d). The Georgia General Assembly did not exceed the scope of its authority as established by the Georgia Constitution. The Defendant's separation of power argument is without merit.

As both of the Defendant's arguments are without merit, it is the finding of this Court that O.C.G.A. § 40-6-376(d) is constitutional. Thus, it is hereby ORDERED that the Defendant's Motion challenging the constitutionality of statute O.C.G.A. 40-6-376(d) be DENIED.

This 25th day of March, 2004.

/S/ Cindy Morris
[Judge of Superior Court,
Conasauga Circuit]

In the Supreme Court of Georgia
Decided: June 6, 2005
S05A0728. PERKINS v. THE STATE

FLETCHER, Chief Justice.

The question in this case is whether a criminal defendant's prior conviction by a court lacking subject matter jurisdiction bars retrial of that defendant in a court having subject matter jurisdiction. We hold that it does not, and therefore affirm the superior court.

This is the second time this case has been before this Court.[1] On November 2, 2000, William Thomas Perkins was involved in an automobile collision that resulted in the death of Brenda Crider. Perkins was cited for reckless driving, and pled guilty to this offense in Whitfield County Probate Court. The probate court imposed a three-month probated sentence, which Perkins served. He also paid fines totaling $184 and his driver's license was suspended for six months. Perkins was subsequently indicted for felony vehicular homicide and for the same reckless driving offense in Whitfield County Superior Court.

The first time this case was before us, the issue was whether the probate court conviction should be set aside as null and void under O.C.G.A. § 40-6-376(d). We answered in the affirmative, but limited out opinion to construction of this statute. We deferred Perkins's claims that the double jeopardy clauses of the state and federal constitutions barred his retrial until such time as the superior court had ruled upon them.[2] The

[1] *State v. Perkins*, 276 Ga. 621 (580 SE2d 523) (2003).

[2] *Id.* at 623.

superior court subsequently ruled that double jeopardy did not bar Perkins's retrial, and Perkins appeals.

1. This Court has held that when a court had no subject matter jurisdiction to try a defendant, any conviction entered by that court is null and void.[3] We have also recognized that a defendant whose conviction is so voided may be retried without the attachment of procedural double jeopardy.[4] Therefore, Perkins may be tried on the felony indictment in superior court. Any issues of substantive double jeopardy that may arise if Perkins is convicted in superior court are not properly before us today.

2. Perkins contention that O.C.G.A. § 40-6-376(d) is unconstitutional on its face is without merit.

Judgment affirmed. All the Justices concur.

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[3] *Mayo v. State*, 277 Ga. 645, 646 (594 SE2d 333) (2004); *Weatherbed v. State*, 271 Ga. 736, 736-737 (524 SE2d 452 (1999).

[4] *Weatherbed*, 271 Ga. at 739; *Mayo*, 277 Ga. At 647 (Carley, J., concurring).

Supreme Court of Georgia
Atlanta, June 30, 2005
Case No. S05A0728

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM THOMAS PERKINS v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V [The Double Jeopardy Clause]:
"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

U.S. CONST. amend. IV [The Due Process Clause]:
"nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

GEORGIA STATUTES

O.C.G.A. § 40-6-376(d) [the statute in question–prosecution of traffic offenses; double jeopardy]:
No court, other than a court having jurisdiction to try a person charged with a violation of Code Section 40-6-393 [homicide by vehicle], shall have jurisdiction over any offense arising under the laws of this state or the ordinances of any political subdivision thereof, which offense arose out of the same conduct which led to said person's being charged with a violation of Code Section 40-6-393 and any judgment rendered by such court shall be null and void.

O.C.G.A. § 40-6-390 [reckless driving]:
Any person who drives any vehicle in reckless disregard for the safety of persons or property commits the offense of reckless driving [a misdemeanor].

O.C.G.A. § 40-6-393 [vehicular homicide]:
(a) Any person who, without malice aforethought, causes the death of another person through the violation of [certain code sections including 40-6-390 (reckless driving)] commits the offense of homicide by vehicle in the first degree [a felony] and, upon conviction thereof, shall be punished by imprisonment for not less than three years nor more than 15 years.
(b) Any person who causes the death of another person, without an intention to do so, by violating any provision of [Georgia's traffic laws] other than [those pertaining to certain serious traffic offenses including reckless driving] commits the offense of homicide by vehicle in the second degree [a misdemeanor] when such violation is the cause of said death .
. . .

GEORGIA STATUTES (con't)

O.C.G.A. § 15-9-30(b) [jurisdiction of probate courts]:
"the probate courts shall have the power to carry out the following duties as assigned by specific laws:
. . . **(8)** Hear traffic cases.

O.C.G.A. § 40-13-21 [jurisdiction of probate and municipal courts; traffic offenses]:
(a) The probate courts and municipal courts of the incorporated towns and cities of this state, acting by and through the judges or presiding officers thereof, shall have the right and power to conduct trials, receive pleas of guilty, and impose sentence, in the manner required by law, upon defendants violating any and all criminal laws of this state relating to traffic upon the public roads, streets, and highways of this state where the penalty for the offense does not exceed that of misdemeanor.
(b) The probate court shall have jurisdiction to issue warrants, try cases, and impose sentence thereon in all misdemeanor cases arising under the traffic laws of this state and all counties of this state in which there is no city, county, or state court, provided the defendant waives a jury trial. Notwithstanding any provision of law to the contrary, all municipal courts are granted jurisdiction to try and dispose of misdemeanor traffic offenses arising under state law except violations of Code Section 40-6-393 [vehicular homicide] and to impose any punishment authorized for such offenses under general state law . . . .

GEORGIA STATUTES (con't)

O.C.G.A. § 40-5-57.1 [driver's license suspension for persons under 21]:
(a) . . . the driver's license of any person under 21 years of age convicted of [certain serious traffic offenses including reckless driving] shall be suspended by the department . . .
(b)(1)(A) Upon a first such suspension, [such person shall] be eligible to apply for license reinstatement and, subject to successful recompletion of the examination requirements . . . and payment of required fees, have his or her driver's license reinstated after six months . . .

O.C.G.A. § 40-5-54 [driver's license suspension for certain offenses]:
(a) The department shall forthwith suspend, as provided in Code Section 40-5-63, the license of any driver upon receiving a record of such driver's conviction of the following offenses . . . **(1)** Homicide by vehicle, as defined by Code Section 40-6-393.

O.C.G.A. § 40-5-63 [periods of license suspension]:
(a) The driver's license of any person convicted of an offense listed in Code Section 40-5-54 . . . shall by operation of law be suspended . . . .
(b) Upon the first conviction of any such offense, . . . the suspension shall be for 12 months. At the end of 120 days, the person may apply to the department for reinstatement of said driver's license. Such license shall be reinstated if such person submits proof of completion of a . . . Risk Reduction Program and pays a restoration fee of $210.00 . . . .